

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ANGELA MARIE HOSLER,

Plaintiff,

v.

CAROLYN W. COLVIN,

Defendant.

NO: 15-CV-0007-FVS

ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND DENYING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary judgment. ECF Nos. 12 and 14. This matter was submitted for consideration without oral argument. Plaintiff was represented by Dana C. Madsen. Defendant was represented by Nicole A. Jabaily. The Court has reviewed the administrative record and the parties' completed briefing and is fully informed. For the reasons discussed below, the Court grants Plaintiff's Motion for Summary Judgment and denies Defendant's Motion for Summary Judgment.

**JURISDICTION**

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ~ 1

1 Plaintiff Angela Marie Hosler protectively filed for disability insurance  
2 benefits and supplemental security income (“SSI”) on March 7, 2011. Tr. 219-231.  
3 In both applications, Plaintiff alleged an onset date of January 31, 2011. Tr. 219,  
4 225. Benefits were denied initially and upon reconsideration. Tr. 138-145, 148-  
5 152. Plaintiff requested a hearing before an administrative law judge (“ALJ”),  
6 which was held before ALJ R.J. Payne on May 1, 2013. Tr. 41-81. Plaintiff was  
7 represented by counsel and testified at the hearing. Tr. 59-81. Medical experts Dr.  
8 John Morse (Tr. 44-50) and Dr. Jay M. Toews (Tr. 50-59) also testified. The ALJ  
9 denied benefits (Tr. 20-40) and the Appeals Council denied review. Tr. 1. The  
10 matter is now before this court pursuant to 42 U.S.C. § 405(g).

### 11 **STATEMENT OF FACTS**

12 The facts of the case are set forth in the administrative hearing and  
13 transcripts, the ALJ’s decision, and the briefs of Plaintiff and the Commissioner,  
14 and will therefore only be summarized here.

15 Plaintiff was 48 years old at the time of the hearing. Tr. 61. She attended  
16 school “up to” ninth grade did not get her GED. Tr. 61-62. Plaintiff’s previous  
17 employment included front desk clerk, convenience store clerk, and waitress. Tr.  
18 63-66. Most recently, she worked as a night auditor at the front desk of a motel for  
19 six and a half years. Tr. 62-63. Plaintiff testified that she quit that job due to  
20 anxiety and panic attacks. Tr. 63. Plaintiff claims she is disabled due to pain in the

1 hips, back, stomach, and hands; migraines; hearing problems; and depression. *See*  
2 Tr. 148. She testified that she does not drive and is sometimes forced to get off the  
3 bus if it is too full of people because of panic attacks. Tr. 70. She can walk a half a  
4 block at a time; can only stand for fifteen to twenty minutes before she starts  
5 hurting; can only sit for half an hour before she has to move; cannot carry a ten  
6 pound bag; and her fingers are “always going numb.” Tr. 70-72, 76. Plaintiff  
7 testified that she has a headache “all the time,” and does not sleep well. Tr. 74-75.  
8 She takes medication for sleeping and anxiety, which helps “a little.” Tr. 69, 75.

### 9 STANDARD OF REVIEW

10 A district court's review of a final decision of the Commissioner of Social  
11 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is  
12 limited: the Commissioner's decision will be disturbed “only if it is not supported  
13 by substantial evidence or is based on legal error.” *Hill v. Astrue*, 698 F.3d 1153,  
14 1158–59 (9th Cir.2012) (citing 42 U.S.C. § 405(g)). “Substantial evidence” means  
15 relevant evidence that “a reasonable mind might accept as adequate to support a  
16 conclusion.” *Id.* at 1159 (quotation and citation omitted). Stated differently,  
17 substantial evidence equates to “more than a mere scintilla[,] but less than a  
18 preponderance.” *Id.* (quotation and citation omitted). In determining whether this  
19 standard has been satisfied, a reviewing court must consider the entire record as a  
20 whole rather than searching for supporting evidence in isolation. *Id.*

1 In reviewing a denial of benefits, a district court may not substitute its  
2 judgment for that of the Commissioner. If the evidence in the record “is susceptible  
3 to more than one rational interpretation, [the court] must uphold the ALJ's findings  
4 if they are supported by inferences reasonably drawn from the record.” *Molina v.*  
5 *Astrue*, 674 F.3d 1104, 1111 (9th Cir.2012). Further, a district court “may not  
6 reverse an ALJ's decision on account of an error that is harmless.” *Id.* at 1111. An  
7 error is harmless “where it is inconsequential to the [ALJ's] ultimate nondisability  
8 determination.” *Id.* at 1115 (quotation and citation omitted). The party appealing  
9 the ALJ's decision generally bears the burden of establishing that it was harmed.  
10 *Shinseki v. Sanders*, 556 U.S. 396, 409–10 (2009).

#### 11 **FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

12 A claimant must satisfy two conditions to be considered “disabled” within  
13 the meaning of the Social Security Act. First, the claimant must be “unable to  
14 engage in any substantial gainful activity by reason of any medically determinable  
15 physical or mental impairment which can be expected to result in death or which  
16 has lasted or can be expected to last for a continuous period of not less than twelve  
17 months.” 42 U.S.C. § 1382c(a)(3)(A). Second, the claimant's impairment must be  
18 “of such severity that he is not only unable to do his previous work[,] but cannot,  
19 considering his age, education, and work experience, engage in any other kind of  
20

1 substantial gainful work which exists in the national economy.” 42 U.S.C. §  
2 1382c(a)(3)(B).

3 The Commissioner has established a five-step sequential analysis to  
4 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§  
5 404.1520(a)(4)(i)-(v); 416.920(a)(4) (i)-(v). At step one, the Commissioner  
6 considers the claimant's work activity. 20 C.F.R. §§ 404.1520(a)(4)(i);  
7 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the  
8 Commissioner must find that the claimant is not disabled. 20 C.F.R. § §  
9 404.1520(b); 416.920(b).

10 If the claimant is not engaged in substantial gainful activities, the analysis  
11 proceeds to step two. At this step, the Commissioner considers the severity of the  
12 claimant's impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii); 416.920(a)(4)(ii). If the  
13 claimant suffers from “any impairment or combination of impairments which  
14 significantly limits [his or her] physical or mental ability to do basic work  
15 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c);  
16 416.920(c). If the claimant's impairment does not satisfy this severity threshold,  
17 however, the Commissioner must find that the claimant is not disabled. *Id.*

18 At step three, the Commissioner compares the claimant's impairment to  
19 several impairments recognized by the Commissioner to be so severe as to  
20 preclude a person from engaging in substantial gainful activity. 20 C.F.R. §§

1 404.1520(a)(4)(iii); 416.920(a) (4)(iii). If the impairment is as severe or more  
2 severe than one of the enumerated impairments, the Commissioner must find the  
3 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d); 416.920(d).

4 If the severity of the claimant's impairment does meet or exceed the severity  
5 of the enumerated impairments, the Commissioner must pause to assess the  
6 claimant's "residual functional capacity." Residual functional capacity ("RFC"),  
7 defined generally as the claimant's ability to perform physical and mental work  
8 activities on a sustained basis despite his or her limitations (20 C.F.R. §§  
9 404.1545(a)(1); 416.945(a)(1)), is relevant to both the fourth and fifth steps of the  
10 analysis.

11 At step four, the Commissioner considers whether, in view of the claimant's  
12 RFC, the claimant is capable of performing work that he or she has performed in  
13 the past ("past relevant work"). 20 C.F.R. §§ 404.1520(a)(4)(iv); 416.920(a)(4)(iv).  
14 If the claimant is capable of performing past relevant work, the Commissioner  
15 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f); 416.920(f).  
16 If the claimant is incapable of performing such work, the analysis proceeds to step  
17 five.

18 At step five, the Commissioner considers whether, in view of the claimant's  
19 RFC, the claimant is capable of performing other work in the national economy. 20  
20 C.F.R. §§ 404.1520(a)(4)(v); 416.920(a) (4)(v). In making this determination, the

1 Commissioner must also consider vocational factors such as the claimant's age,  
2 education and work experience. *Id.* If the claimant is capable of adjusting to other  
3 work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. § §  
4 404.1520(g)(1); 416.920(g) (1). If the claimant is not capable of adjusting to other  
5 work, the analysis concludes with a finding that the claimant is disabled and is  
6 therefore entitled to benefits. *Id.*

7 The claimant bears the burden of proof at steps one through four above.  
8 *Lockwood v. Comm'r of Soc. Sec. Admin.*, 616 F.3d 1068, 1071 (9th Cir.2010). If  
9 the analysis proceeds to step five, the burden shifts to the Commissioner to  
10 establish that (1) the claimant is capable of performing other work; and (2) such  
11 work “exists in significant numbers in the national economy.” 20 C.F.R. § §  
12 404.1560(c); 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir.2012).

### 13 ALJ’S FINDINGS

14 The ALJ found that Plaintiff met the insured status requirements of the  
15 Social Security Act through December 31, 2015. Tr. 25. At step one, the ALJ  
16 found Plaintiff had not engaged in substantial gainful activity since January 31,  
17 2011, the alleged onset date. Tr. 25. At step two, the ALJ found Plaintiff has the  
18 following severe impairment: hearing loss (20 CFR 404.1520(c) and 416.920(c)).  
19 Tr. 25. At step three, the ALJ found that Plaintiff does not have an impairment or  
20 combination of impairments that meets or medically equals one of the listed

1 impairments in 20 C.F.R. Part 404, Subpt. P, App'x 1. Tr. 31. The ALJ then found  
2 that Plaintiff had the RFC to perform the full range of work at all exertional levels  
3 defined in 20 CFR 404.1567(c) and 416.967(c) that do not require exposure to loud  
4 noise or a noisy work setting. Tr. 32. At step four, the ALJ found Plaintiff is  
5 capable of performing past relevant work as a night auditor, front desk clerk,  
6 convenience store clerk, casino waitress, and cocktail waitress; because this work  
7 does not require the performance of work-related activities precluded by the  
8 Plaintiff's RFC (20 CFR 404.1565 and 416.965). Tr. 34. The ALJ also  
9 alternatively found that at step five, considering Plaintiff's age, education, work  
10 experience, and RFC, there are other jobs that exist in significant numbers in the  
11 national economy that the Plaintiff can perform. Tr. 35. Thus, the ALJ concluded  
12 Plaintiff has not been under a disability, as defined in the Social Security Act, from  
13 January 31, 2011 through the date of his decision. Tr. 35.

## 14 ISSUES

15 The question is whether the ALJ's decision is supported by substantial  
16 evidence and free of legal error. Specifically, Plaintiff asserts: (1) the ALJ erred by  
17 improperly discrediting Plaintiff's subjective complaints; (2) the ALJ improperly  
18 evaluated the opinions of examining psychologists Dr. Catherine MacLennan, Dr.  
19 Rachael McDougall, and Dr. John Arnold; and (3) the ALJ erred at step two by not  
20 finding severe mental impairments. ECF No. 12 at 8-15. Defendant argues: (1) the



1 ALJ's assessment of Plaintiff's credibility was reasonable; (2) the ALJ reasonably  
2 weighed the medical opinions of record; (3) the ALJ reasonably concluded that  
3 hearing loss was Plaintiff's only severe medically determinable impairment at step  
4 two. ECF No. 14 at 2-14.

## 5 DISCUSSION

### 6 A. Credibility

7 In social security proceedings, a claimant must prove the existence of  
8 physical or mental impairment with "medical evidence consisting of signs,  
9 symptoms, and laboratory findings." 20 C.F.R. §§ 416.908; 416.927. A claimant's  
10 statements about his or her symptoms alone will not suffice. *Id.* Once an  
11 impairment has been proven to exist, the claimant need not offer further medical  
12 evidence to substantiate the alleged severity of his or her symptoms. *Bunnell v.*  
13 *Sullivan*, 947 F.2d 341, 345 (9th Cir.1991) (en banc). As long as the impairment  
14 "could reasonably be expected to produce [the] symptoms," the claimant may offer  
15 a subjective evaluation as to the severity of the impairment. *Id.* This rule  
16 recognizes that the severity of a claimant's symptoms "cannot be objectively  
17 verified or measured." *Id.* at 347 (quotation and citation omitted).

18 If an ALJ finds the claimant's subjective assessment unreliable, "the ALJ  
19 must make a credibility determination with findings sufficiently specific to permit  
20 [a reviewing] court to conclude that the ALJ did not arbitrarily discredit claimant's

1 testimony.” *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir.2002). In making this  
2 determination, the ALJ may consider, *inter alia*: (1) the claimant's reputation for  
3 truthfulness; (2) inconsistencies in the claimant's testimony or between his  
4 testimony and his conduct; (3) the claimant's daily living activities; (4) the  
5 claimant's work record; and (5) testimony from physicians or third parties  
6 concerning the nature, severity, and effect of the claimant's condition. *Id.* Absent  
7 any evidence of malingering, the ALJ's reasons for discrediting the claimant's  
8 testimony must be “specific, clear and convincing.” *Chaudhry v. Astrue*, 688 F.3d  
9 661, 672 (9th Cir.2012) (quotation and citation omitted).<sup>1</sup>

10 Here, the ALJ found that Plaintiff’s “statements concerning the intensity,  
11 persistence and limiting effects of [her] symptoms are not entirely credible.” Tr.

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12 <sup>1</sup> Defendant argues that this court should apply a more deferential “substantial  
13 evidence” standard of review to the ALJ’s credibility findings. ECF No. 14 at 8  
14 n.1. The court declines to apply this lesser standard. The Ninth Circuit recently  
15 reaffirmed in *Garrison v. Colvin* that “the ALJ can reject the claimant’s testimony  
16 about the severity of her symptoms only by offering specific, clear and convincing  
17 reasons for doing so;” and further noted that “[t]he governments suggestion that we  
18 should apply a lesser standard than ‘clear and convincing’ lacks any support in  
19 precedent and must be rejected.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir.  
20 2014).

33. Plaintiff argues the ALJ “failed to provide specific findings with clear and convincing reasons for discrediting [Plaintiff’s] symptom claims.” ECF No. 12 at 9. The court agrees. Initially, the ALJ notes that, while Plaintiff testified to pain at a level 8 on a 1-10 scale at the hearing (Tr. 80), “she did not exhibit any difficulty sitting during the almost hour long hearing, despite her claims that she can only sit for half an hour.” Tr. 33. Defendant argues that the inclusion of the ALJ’s personal observations does not, in itself, render a decision improper. ECF No. 14 at 9 (citing *Morgan v. Comm’r of Soc. Sec. Admin.*, 169 F.3d at 595, 600 (9th Cir. 1999)). However, it is widely held in the Ninth Circuit that an ALJ’s observation “[t]hat a claimant does not exhibit manifestations of pain at the hearing before the ALJ is, standing alone, insufficient to rebut a claim of pain.” *Fair v. Bowen*, 885 F.2d 597, 602 (9th Cir. 1989); *see also Gallant v. Heckler*, 753 F.2d 1450, 1455 (9th Cir. 1984) (finding ALJ’s finding that claimant “sat for over an hour without any apparent distress ... provides little, if any, support for the ALJ’s ultimate conclusion that the claimant is not disabled or that his allegations of constant pain are not credible.”). As discussed in detail below, the ALJ’s additional reasons for rejecting Plaintiff’s testimony are not clear, convincing, and supported by substantial evidence.

First, the ALJ notes that Plaintiff’s daily activities, as she described them at the hearing are “quite full.” Tr. 33. It is well-settled that a claimant need not be

1 utterly incapacitated in order to be eligible for benefits. *Fair*, 885 F.2d at 603.  
2 However, there are two grounds for using daily activities to form the basis of an  
3 adverse credibility determination. *See Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir.  
4 2007). First, the daily activities may contradict a claimant's other testimony. *Id.*;  
5 *Molina*, 674 F.3d at 1113 ("Even where those activities suggest some difficulty  
6 functioning, they may be grounds for discrediting the claimant's testimony to the  
7 extent that they contradict claims of a totally debilitating impairment."). Second,  
8 daily activities may be grounds for an adverse credibility finding if a claimant is  
9 able to spend a substantial part of his or her day engaged in pursuits involving the  
10 performance of physical functions that are transferable to a work setting. *Orn*, 495  
11 F.3d at 639. In support of his reasoning, the ALJ in this case cited Plaintiff's  
12 testimony that she lives alone, cares for her own needs, takes the bus, visits with  
13 neighbors, and performs household chores. Tr. 33. The ALJ referred to portions of  
14 the record indicating that Plaintiff goes to the casino "at times," and "at one point  
15 cared for her nephew, including helping with homeschooling." Tr. 33.

16 However, the ALJ does not identify specific testimony he finds not to be  
17 credible, nor does he offer explanations for why the evidence undermines  
18 Plaintiff's testimony. *Holohan v. Massanari*, 246 F.3d 1195, 1208 (9th Cir. 2001)  
19 (in making a credibility finding, the ALJ "must specifically identify the testimony  
20 she or he finds not to be credible and must explain what evidence undermines the

1 testimony.”). Moreover, as noted by Plaintiff, the daily activities listed by the ALJ  
2 are “taken out of the context of [Plaintiff’s] testimony.” ECF No. 12 at 9. Plaintiff  
3 testified that she has to get off the bus when it gets too full because she cannot  
4 breathe. Tr. 70. She testified that her neighbor will take her grocery shopping when  
5 she is unable to take the bus, or she sometimes has to take consistent trips because  
6 she cannot carry a lot at a time. Tr. 71-72. Plaintiff also testified that she could not  
7 vacuum very often because of pain, and could only do dishes and laundry in small  
8 amounts at a time. Tr. 72-73. Plaintiff did report once in May 2011 that she  
9 “occasionally” went to the casino; however, while not noted by the ALJ, this  
10 statement was qualified by Plaintiff’s simultaneous report that is “too  
11 uncomfortable in a big crowded place and has panic attacks” and “has never been  
12 one who goes out.” Tr. 296. Finally, while Plaintiff reported once to Dr.  
13 McDougall in September 2011 that she “helps” her nephew with homeschooling  
14 (Tr. 314), there is no detail in the record as to what this “help” entailed or how it  
15 contradicted the Plaintiff’s claimed impairments. *See Thomas*, 278 F.3d at 958  
16 (ALJ must “make a credibility determination with findings sufficiently specific to  
17 permit the court to conclude that the ALJ did not arbitrarily discredit claimant’s  
18 testimony.”). The ALJ fails to identify with specificity how the identified daily  
19 activities are inconsistent with Plaintiff’s claims of disability. In addition, the ALJ  
20 does not make any findings that Plaintiff’s “daily activities” are performed for a

1 substantial part of the day or in a manner transferable to the workplace. *See Orn*,  
2 495 F.3d at 639. Therefore, this was not a clear and convincing reason to find  
3 Plaintiff not credible.

4 Second, the ALJ notes that Plaintiff's reasons for leaving her employment  
5 are "rather cloudy." Tr. 33. In support of this finding the ALJ references Plaintiff's  
6 reports to Dr. MacLennan in May 2011 that she left her previous job "because of  
7 different things," including: moving to Spokane to help her son, and because the  
8 business was sold and she did not know if she would have a job. Tr. 33, 294. The  
9 ALJ also cites Plaintiff's reports in April 2013 that after working at her previous  
10 job for six and a half years, she left because the business was sold. Tr. 370. Then,  
11 as noted by the ALJ, in direct contrast to all of the previous reasons given for  
12 stopping work, Plaintiff testified at the hearing that she had to quit her job because  
13 she was starting to panic and have anxiety. Tr. 33, 63. Plaintiff argues that these  
14 varying reports "merely [show] that there were compound reasons for her  
15 departure." ECF No. 12 at 11. However, an ALJ may consider that a claimant  
16 stopped working for reasons unrelated to the allegedly disabling condition when  
17 making a credibility determination. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1040  
18 (9th Cir. 2008); *see also Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996)  
19 (ALJ may rely on ordinary techniques of credibility evaluation). Here, the ALJ  
20 reasonably considered that Plaintiff stopped working for reasons other than her

1 disability as evidence of some lack of credibility. However, standing alone, this  
2 reason does not constitute clear and convincing evidence to justify the overall  
3 adverse credibility finding.

4 Third, the ALJ noted that despite claiming disability since January 2011,  
5 Plaintiff did not seek any treatment until September 2012. Tr. 33. Unexplained, or  
6 inadequately explained, failure to seek treatment or follow a prescribed course of  
7 treatment may be the basis for an adverse credibility finding unless there is a  
8 showing of a good reason for the failure. *Orn v. Astrue*, 495 F.3d 625, 638 (9th  
9 Cir. 2007). However, an ALJ “must not draw any inferences about an individual’s  
10 symptoms and their functional effects from a failure to seek or pursue regular  
11 medical treatment without first considering any explanations that the individual  
12 may provide, or other information in the case record, that may explain infrequent  
13 or irregular medical visits or failure to seek medical treatment.” Social Security  
14 Ruling (“SSR”) 96-7p at \*7 (July 2, 1996), available at 1996 WL 374186. Here,  
15 the ALJ does not consider Plaintiff’s consistent reports that she did not seek  
16 medical care due to a fear of medical and psychological providers developed many  
17 years ago after experiencing side effects from medication that made her “unaware  
18 of what she was doing.” Tr. 293, 297, 311. The record also indicates that Plaintiff  
19 was homeless for at least a portion of the adjudicatory period, which arguably  
20 limited her access to medical care. Tr. 294, 328, 398. Moreover, examining mental

1 health professionals found, respectively, that Plaintiff had poor judgment and  
2 insight into her own condition (Tr. 297), moderate limitations in her ability to  
3 exercise judgment and make decisions (Tr. 315), and moderate limitations in her  
4 ability to be aware of normal hazards and take appropriate precautions (Tr. 326).  
5 As cited by Plaintiff, “it is a questionable practice to chastise one with a mental  
6 impairment for the exercise of poor judgment in seeking rehabilitation.” ECF No.  
7 12 at 11 (citing *Nguyen v. Chater*, 100 F.3d 1462, 1465 (9th Cir. 1989)). For all of  
8 these reasons, the ALJ erred in rejecting Plaintiff’s credibility based on delay in  
9 seeking medical care.

10 Fourth, the ALJ briefly notes that “claimant has claimed significant mental  
11 health symptoms, yet reports in the [Community Health Association of Spokane]  
12 records indicate limited depression that improves within a month.” Tr. 33. An  
13 impairment that can be effectively controlled with treatment is not disabling.  
14 *Warre v. Comm’r, Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006). In  
15 support of this finding, the ALJ generally references medical records from the  
16 period of September 28, 2012 through February 6, 2013. Tr. 328-363. Records  
17 from this period do indicate that Plaintiff initially presented with the symptoms of  
18 a major depressive episode, for which she was prescribed medication, and then  
19 reported improvement in symptoms the following month. Tr. 328, 338. However,  
20 the ALJ does not appear to consider that in February 2013, despite reporting that



1 her status was “overall improved,” Plaintiff complained of depressed mood, panic  
2 attacks and sleep disturbances, and “negatives include feelings of guilt or  
3 worthlessness, restlessness, or sluggishness or thoughts of death or suicide.” Tr.  
4 353. Her medication for “depression with anxiety” was increased again at that  
5 visit. Tr. 354. Similarly, in April 2013, Plaintiff reported that her medication  
6 helped with her depression, but still scored 20/27 on the PHQ-9 depression scale  
7 and 17/21 on the GAD-7 anxiety scale. Specifically, Plaintiff reported that over the  
8 last two weeks she was bothered by the following problems “nearly every day:”  
9 little interest or pleasure in doing things; feeling down, depressed or hopeless;  
10 trouble sleeping; feeling tired or having little energy; not being able to stop or  
11 control worrying; worrying too much about different things; and trouble relaxing.  
12 Tr. 375. Thus, after reviewing the entire record, the court finds this reason is not  
13 clear, convincing, and supported by substantial evidence.

14 Finally, the ALJ notes several alleged inconsistent statements by Plaintiff  
15 regarding her limitations. *See Thomas*, 278 F.3d at 958-59 (in evaluating  
16 credibility, an ALJ may consider inconsistencies in Plaintiff’s testimony or  
17 between his testimony and his conduct); *see also Smolen v. Chater*, 80 F.3d 1273,  
18 1284 (9th Cir. 1996) (ALJ may consider prior inconsistent statements concerning  
19 symptoms in considering credibility). First, the ALJ found that despite her limited  
20 education and reported problems understanding what she reads, “at the hearing

1 [Plaintiff] admitted she enjoyed reading love stories and spending an hour at a time  
2 in the library on the computer.” Tr. 33. However, while not identified by the ALJ,  
3 Plaintiff also testified at the hearing that despite picking out books from the library,  
4 she is unable to understand “a real lot of it” and it takes her almost a day to read  
5 just one page. Tr. 74. Moreover, Plaintiff consistently reports throughout the record  
6 that she has limited education and difficulty understanding what she reads. Tr. 296,  
7 311, 324. Thus, the court is unable to discern any inconsistency in Plaintiff’s  
8 testimony or between her testimony and conduct regarding her reading ability.  
9 Second, the ALJ notes that Plaintiff claims that she cannot be outside alone due to  
10 panic attacks, “yet [] she walked alone one block to the evaluation, is able to take  
11 the bus [], and currently lives alone.” Tr. 33. However, as above, the ALJ does not  
12 consider Plaintiff’s testimony that she has to get off the bus “a lot of times” if it is  
13 too full of people; nor does the ALJ note that despite walking one block to her  
14 evaluation, she contemporaneously reported that she has panic attacks when she  
15 goes anywhere by herself. Tr. 69, 294. Moreover, the court fails to see how living  
16 alone in a single occupancy dwelling is inconsistent with Plaintiff’s reported  
17 difficulty being *outside* by herself. This reason is not supported by substantial  
18 evidence.

1 Overall, the court finds the ALJ's reasons for making an adverse credibility  
2 finding in this case were not specific, clear and convincing. On remand, the ALJ  
3 must make a proper determination of credibility supported by substantial evidence.

#### 4 **B. Medical Opinions**

5 There are three types of physicians: "(1) those who treat the claimant  
6 (treating physicians); (2) those who examine but do not treat the claimant  
7 (examining physicians); and (3) those who neither examine nor treat the claimant  
8 [but who review the claimant's file] (nonexamining [or reviewing] physicians)." *Holohan v. Massanari*, 246 F.3d 1195, 1201–02 (9th Cir.2001)(citations omitted).

9 Generally, a treating physician's opinion carries more weight than an examining  
10 physician's, and an examining physician's opinion carries more weight than a  
11 reviewing physician's. *Id.* If a treating or examining physician's opinion is  
12 contradicted, the ALJ may reject it only by offering "clear and convincing  
13 reasons that are supported by substantial evidence." *Bayliss v. Barnhart*, 427 F.3d  
14 1211, 1216 (9th Cir.2005). Conversely, "[i]f a treating or examining doctor's  
15 opinion is contradicted by another doctor's opinion, an ALJ may only reject it by  
16 providing specific and legitimate reasons that are supported by substantial  
17 evidence." *Id.* (citing *Lester v. Chater*, 81 F.3d 821, 830–831 (9th Cir.1995)).

18 Plaintiff contends that the ALJ improperly rejected the opinions of his medical  
19  
20

1 providers, including: examining psychologists Dr. Catherine A. MacLennan, Dr.  
2 Rachael McDougall, and Dr. John Arnold. ECF No. 12 at 13-14.

3 1. Dr. Catherine A. MacLennan

4 Dr. MacLennan examined Plaintiff once in May 2011 and completed a  
5 psychological evaluation including a mental status examination, but did not  
6 complete a mental medical source statement identifying levels of functioning. Tr.  
7 293-298. Dr. MacLennan diagnosed post-traumatic stress disorder chronic and  
8 complex; anxiety disorder with panic attacks; rule out reading disorder;  
9 amphetamine dependence in full remission; and traits of borderline personality  
10 disorder. Tr. 296. She opined that Plaintiff is able to reason, sustain concentration,  
11 pace and persistence, and sustain focused attention long enough to ensure the  
12 timely completion of tasks. Tr. 297. She also opined that Plaintiff “would do better  
13 emotionally if she were able to work at least part-time. In spite of the symptoms of  
14 PTSD, it seems she is able to respond appropriately to changes in the work place in  
15 a calm and quiet setting. Clearly she would not be able to cope with a loud or  
16 crowded environment.” Tr. 298. As part of the step two analysis, the ALJ  
17 referenced Dr. MacLennan’s findings, and found that “the only limitation indicated  
18 was that Dr. MacLennan felt the claimant would not be able to cope with a loud or  
19 crowded environment, which is not inconsistent with the residual functional  
20 capacity outlined above.” Tr. 30.

1 Plaintiff sole argument is that the ALJ erred by finding Dr. MacLennan's  
2 opinion was "clearly sympathetic to the claimant's complaints." ECF No. 12 at 13-  
3 14. It is well-settled in the Ninth Circuit that the purpose for which a report is  
4 obtained does not provide a legitimate basis for rejecting it. *See Lester*, 81 F.3d at  
5 832 ("The Secretary may not assume that doctors routinely lie in order to help  
6 their patients collect disability benefits."). However, regardless of any alleged  
7 "sympathy" accorded to Plaintiff's complaints, Dr. MacLennan opined that  
8 Plaintiff "would do better emotionally if she were able to work at least part-time,"  
9 with the only assessed limitation that "[c]learly [Plaintiff] would not be able to  
10 cope with a loud or crowded environment." Tr. 298. As argued by the Defendant,  
11 the ALJ properly accounted for this restriction in the assessed RFC by limiting  
12 Plaintiff to work that does "not require exposure to loud noise or a noisy work  
13 setting." ECF No. 14 at 12 (citing Tr. 32). Plaintiff's briefing does not identify  
14 with specificity any discrepancy between Dr. MacLennan's opinion and the  
15 assessed RFC. *See Carmickle*, 533 F.3d at 1161 n.2 (court may decline to address  
16 any issue not raised with specificity in Plaintiff's briefing). Thus, even assuming  
17 the ALJ improperly "rejected" Dr. MacLennan's opinion, any error was harmless.  
18 *Molina*, 674 F.3d at 1115 (error is harmless "where it is inconsequential to the  
19 [ALJ's] ultimate nondisability determination.").

20 2. Dr. Rachael McDougall and Dr. John Arnold

1 As part of the step two finding, the ALJ examined Dr. McDougall and Dr.  
2 Arnold's opinions jointly (Tr. 31), thus, the court will do the same. While not  
3 noted in the ALJ's decision, each doctor examined the Plaintiff and separately  
4 opined moderate to marked functional limitations. In September 2011, Dr.  
5 McDougall diagnosed Plaintiff with major depressive disorder, recurrent moderate;  
6 posttraumatic stress disorder, chronic moderate; panic disorder without  
7 agoraphobia; alcohol dependence; cannabis dependence in full sustained  
8 remission; and amphetamine dependence in full sustained remission. Tr. 313. Dr.  
9 McDougall opined that Plaintiff had moderate limitations in the following areas:  
10 the ability to understand, remember and follow simple and complex instructions;  
11 the ability to learn new tasks, the ability to exercise judgment and make decisions;  
12 the ability to relate appropriately to co-workers and supervisors; the ability to  
13 interact appropriately in public contacts; the ability respond appropriately to and  
14 tolerate the pressures and expectations of a normal work setting; and the ability to  
15 maintain appropriate behavior in a work setting. Tr. 315-316.

16 In September 2012, Dr. Arnold diagnosed Plaintiff with major depression,  
17 recurrent, severe, rule out psychotic features; and personality disorder, NOS with  
18 borderline features. Tr. 325. He opined that Plaintiff had marked limitations in her  
19 ability to perform activities within a schedule, maintain regular attendance, and be  
20 punctual within customary tolerances without special supervision; communicate

1 and perform effectively in a work setting; maintain appropriate behavior in a work  
2 setting; and set realistic goals and plan independently. Tr. 326. Dr. Arnold also  
3 assessed moderate limitations in Plaintiff's ability to: understand, remember, and  
4 persist in tasks by following detailed instructions; perform routine tasks without  
5 special supervision; adapt to changes in a routine work setting; make simple work-  
6 related decisions; be aware of normal hazards and take appropriate precautions;  
7 and complete a normal work day and work week without interruptions from  
8 psychologically based symptoms. Tr. 326.

9       The ALJ does not assign any level of weight to Dr. McDougall and Dr.  
10 Arnold's respective opinions, but appears to reject them for several reasons. First,  
11 the ALJ "notes these examiners placed undue reliance upon the subjective  
12 allegations of an individual in a setting where she was being evaluated for the  
13 specific purpose of determining entitlement to state general assistance benefits."  
14 Tr. 31. However, as argued by the Plaintiff, the purpose for which a report is  
15 obtained does not provide a legitimate basis for rejecting it. ECF No. 12 at 14  
16 (citing *Lester*, 81 F.3d at 832). Moreover, while Defendant is correct that a  
17 physician's opinion may be rejected if it is based on a claimant's subjective  
18 complaints which were properly discounted; the ALJ's credibility finding in this  
19 case was not based on clear and convincing reasons supported by substantial  
20

1 evidence. ECF No. 14 at 13-14 (citing *Fair*, 885 F.2d at 604). These are not  
2 specific and legitimate reasons to reject Dr. McDougall and Dr. Arnold's opinions.

3       The second, and primary reason, given by the ALJ for discounting these  
4 opinions appears to be an alleged lack of support for Dr. McDougall and Dr.  
5 Arnold's findings in the overall medical record. Tr. 31. The ALJ found the  
6 opinions "are limited by the fact that these conclusions are not supported by  
7 commensurate clinical findings of abnormality contained in longitudinal medical  
8 records, including the opinion of the medical expert Dr. Toews." Tr. 31. A few  
9 sentences later, the ALJ similarly reasons that the opinions "are not supported by  
10 the CHAS records that indicate the claimant did well after being placed on  
11 medication, and the apparent decline in functioning between the two DSHS  
12 evaluations cannot be explained by any evidence in the treatment record." Tr. 31.  
13 An ALJ may reject a physician's opinion that is unsupported by the record as a  
14 whole, or by objective medical findings. *Tonapetyan v. Halter*, 242 F.3d 1144,  
15 1149 (9th Cir. 2001). However, when explaining his reasons for rejecting medical  
16 opinion evidence, the ALJ must do more than state a conclusion, rather, the ALJ  
17 must "set forth his own interpretations and explain why they, rather than the  
18 doctors', are correct." *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998). "This  
19 can be done by setting out a detailed and thorough summary of the facts and  
20



1 conflicting clinical evidence, stating his interpretation thereof, and making  
2 findings.” *Id.*

3 Here, the ALJ does not cite any specific records, nor does he summarize  
4 conflicting clinical evidence to support his finding. *See* Tr. 82. Instead, the ALJ  
5 briefly references, without citation, that Plaintiff “did well after being placed on  
6 medication.” Tr. 31. However, as discussed in detail above, while Plaintiff did  
7 report some improvement in symptoms after beginning medication (Tr. 328, 338),  
8 records still include ongoing complaints of depressed mood, panic attacks, sleep  
9 disturbances, and “feelings of guilt or worthlessness, restlessness, or sluggishness  
10 or thoughts of death or suicide” that necessitated an increase in her medication  
11 dosage. Tr. 353-354. Similarly, in April 2013, Plaintiff reported that her  
12 medication helped with her depression, but still reported that “nearly every day”  
13 she experienced little interest or pleasure in doing things; feeling down, depressed  
14 or hopeless; trouble sleeping; feeling tired or having little energy; not being able to  
15 stop or control worrying; worrying too much about different things; and trouble  
16 relaxing. Tr. 375. Thus, the court agrees with Plaintiff that the ALJ’s reasoning  
17 regarding Plaintiff’s alleged “improvement” after being placed on medication is  
18 not supported by substantial evidence. ECF No. 12 at 14.

19 Finally, the ALJ generally cites the opinion of medical expert Dr. Toews as  
20 support for his reasoning that examining physicians Dr. McDougall and Dr.

1 Arnold's opinions are not supported by "commensurate clinical findings of  
2 abnormality contained in the longitudinal record." Tr. 31. As an initial matter, the  
3 court notes again that the "longitudinal record" in this case is almost entirely  
4 comprised of Plaintiff's ongoing treatment for mental health issues. Tr. 328-343,  
5 353-357 365-377. Regardless, Dr. Toews testified that Plaintiff had no restriction  
6 of activities of daily living; no episodes of decompensation; and only mild  
7 functional limitations in maintaining social functioning, and maintaining  
8 concentration, persistence or pace. Tr. 57-58, 393. Plaintiff correctly argues that  
9 "[t]he opinion of a nonexamining physician cannot *by itself* constitute substantial  
10 evidence that justifies the rejection of the opinion of either an examining or a  
11 treating physician." *See Lester*, 81 F.3d at 831(emphasis in original). An ALJ may  
12 rely upon the opinion of a non-examining medical advisor as long as other  
13 evidence in the record is consistent with those findings. *See Magallanes v Bowen*,  
14 881 F.2d 747, 752 (9th Cir. 1989); *see also Andrews v. Shalala*, 53 F.3d 1035,  
15 1041 (9th Cir. 1995)(when a treating physician's opinion is contradicted by  
16 medical evidence, the opinion may still be rejected if the ALJ provides specific and  
17 legitimate reasons supported by substantial evidence in the record). However, in  
18 this case, the ALJ failed to identify substantial evidence consistent with the  
19 findings of Dr. Toews; nor did he offer additional specific and legitimate reasons  
20 supported by substantial evidence that would sufficiently justify the rejection the

1 opinions of examining physicians Dr. McDougall and Dr. Arnold. Thus, the ALJ  
2 erred by relying solely on Dr. Toews' opinion testimony as a reason to reject Dr.  
3 McDougall and Dr. Arnold's opinions.

4 For all of these reasons, the ALJ erred in evaluating the opinions of Dr.  
5 McDougall and Dr. Arnold. The ALJ must reconsider these opinions upon remand.

### 6 **C. Step Two**

7 At step two of the sequential process, the ALJ must determine whether  
8 Plaintiff suffers from a severe impairment. 20 C.F.R. § 416.920(a). To be  
9 considered 'severe,' an impairment must significantly limit an individual's ability  
10 to perform basic work activities. 20 C.F.R. §§ 404.1520(c), 416.920(c); *Smolen v.*  
11 *Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). An impairment that is 'not severe'  
12 must be a slight abnormality (or a combination of slight abnormalities) that has no  
13 more than a minimal effect on the ability to do basic work activities. SSR 96-3P,  
14 1996 WL 374181 at \*1 (July 2, 1996). Basic work activities are the "abilities and  
15 aptitudes necessary to do most jobs," which includes, for example: walking,  
16 standing, sitting, lifting, pushing, pulling, reaching, carrying or handling;  
17 understanding, carrying out, and remembering simple instructions; use of  
18 judgment; responding appropriately to supervision, co-workers and usual work  
19 situations; and dealing with changes in a routine work setting. 20 C.F.R. §  
20 404.1521(b). Plaintiff bears the burden to establish the existence of a severe

1 impairment or combination of impairments, which prevent him from performing  
2 substantial gainful activity, and that the impairment or combination of impairments  
3 lasted for at least twelve continuous months. 20 C.F.R. §§ 404.1505, 404.1512(a);  
4 *Edlund v. Massanari*, 253 F.3d 1152, 1159-60 (9th Cir. 2011). However, step two  
5 is “a de minimus screening device [used] to dispose of groundless claims.” *Smolen*,  
6 80 F.3d at 1290. “Thus, applying our normal standard of review to the  
7 requirements of step two, we must determine whether the ALJ had substantial  
8 evidence to find that the medical evidence clearly established that [Plaintiff] did  
9 not have a medically severe impairment or combination of impairments.” *Webb v.*  
10 *Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005).

11 Here, at step two, the ALJ found that Plaintiff’s “proposed and/or diagnosed  
12 mental impairments ... considered singly and in combination, do not cause more  
13 than minimal limitation in the claimant’s ability to perform basic mental work  
14 activities and are therefore nonsevere.” Tr. 30. Plaintiff argues the ALJ erred by  
15 failing to find severe mental limitations at step two. ECF No. 12 at 12-13.  
16 Defendant responds by citing evidence, identified by the ALJ, to support the  
17 finding that Plaintiff’s alleged mental impairments were not severe. ECF No. 14 at  
18 3-5. This evidence is almost entirely comprised of medical expert Dr. Toews’  
19 testimony that Plaintiff had no more than mild limitations in the four broad  
20 functional areas set out in the disability regulations for evaluating mental disorders,

1 and therefore did not have a severe mental impairment. ECF No. 14 at 3-5 (citing  
2 Tr. 29-31, 47-58). However, as discussed above, the medical evidence  
3 demonstrates that Plaintiff regularly received treatment for mental health  
4 complaints from treating medical professionals. Tr. 328-343, 353-357 365-377.  
5 Plaintiff was also prescribed medication for treatment of these mental health  
6 conditions. Tr. 330, 339, 354, 367, 381. Most significantly, as noted by Plaintiff  
7 and discussed in detail above, the ALJ did not properly consider the opinions of  
8 examining psychologists Dr. McDougall and Dr. Arnold, who separately assessed  
9 moderate to marked limitations in Plaintiff's ability to perform basic work  
10 activities, including but not limited to: exercising judgment and making decisions;  
11 relating appropriately to co-workers and supervisors; performing activities within a  
12 schedule, maintain regular attendance, and be punctual within customary  
13 tolerances without special supervision; completing a normal work day and work  
14 week without interruptions from psychologically based symptoms; and  
15 maintaining appropriate behavior in a work setting. Tr. 315-316, 326.

16 For all of these reasons, the ALJ's step two finding regarding Plaintiff's  
17 alleged mental health impairments was not supported by substantial evidence.  
18 Defendant argues that any error at this step was harmless "because the ALJ  
19 analyzed Plaintiff's [RFC] based on all her severe and nonsevere impairments,  
20 including her anxiety." ECF No. 14 at 5-6. Defendant is correct that the failure by

1 an ALJ to include an impairment at step two is harmless when the decision reflects  
2 that the ALJ considered any limitations posed by the impairment at steps four and  
3 five. *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007). However, in support of  
4 this contention Defendant relies entirely on two sentences in the ALJ's erroneous  
5 adverse credibility that allege inconsistencies in Plaintiff's mental health  
6 complaints. ECF No. 14 at 5-6 (citing Tr. 33). The court is unable to discern any  
7 consideration by the ALJ of the copious limitations opined by Dr. McDougall and  
8 Dr. Arnold at steps four or five. It is similarly unclear whether the ALJ considered  
9 all of Plaintiff's alleged mental health limitations when assessing the RFC. Thus,  
10 the court cannot find the ALJ's error harmless in this case due to the ALJ's  
11 improper consideration of Dr. McDougall and Dr. Arnold's psychological  
12 evaluations; the improper credibility finding; and the failure to consider Plaintiff's  
13 treatment history for depression, anxiety, PTSD, and sleep problems. Upon  
14 remand, the ALJ must reconsider his findings at step two.

### 15 CONCLUSION

16 The ALJ's decision was not supported by substantial evidence and free of  
17 legal error. Remand is appropriate when, like here, a decision does not adequately  
18 explain how a conclusion was reached, "[a]nd that is so even if [the ALJ] can offer  
19 proper post hoc explanations for such unexplained conclusions," for "the  
20 Commissioner's decision must stand or fall with the reasons set forth in the ALJ's

1 decision, as adopted by the Appeals Council.” *Barbato v. Comm'r of Soc. Sec.*, 923  
2 F.Supp. 1273, 1276 n. 2 (C.D.Cal.1996) (citations omitted). On remand, the ALJ  
3 must reconsider the credibility analysis. Additionally, the ALJ is directed to  
4 properly weigh the opinions of Dr. McDougall and Dr. Arnold, and provide legally  
5 sufficient reasons for evaluating these opinions, supported by substantial evidence.  
6 Finally, the ALJ must reconsider the step two findings; and, if necessary,  
7 reevaluate the RFC and the entirety of the sequential process.

8 **ACCORDINGLY, IT IS HEREBY ORDERED:**

9 1. Plaintiff’s Motion for Summary Judgment, ECF No. 12, is **GRANTED**.

10 The matter is remanded to the Commissioner for additional proceedings  
11 pursuant to sentence four 42 U.S.C. § 405(g).

12 2. Defendant’s Motion for Summary Judgment, ECF No. 14, is **DENIED**.

13 The District Court Executive is hereby directed to enter this Order and  
14 provide copies to counsel.

15 **DATED** March 23, 2016.

16 s/Fred Van Sickle  
17 Fred Van Sickle  
18 Senior United States District Judge  
19  
20